

No. 10289

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United States  
Circuit Court of Appeals  
For the Ninth Circuit.

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LOMBARD TRUSTEES, LTD., a Trust, and  
CHARLES S. LOMBARD, BERTHA M.  
LOMBARD and NORMAN M. LOMBARD,  
Trustees thereof,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,  
Respondent.

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Transcript of the Record

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Upon Petition to Review a Decision of the  
Tax Court of the United States

FILED

NOV 13 1942



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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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United States Circuit Court of Appeals  
for the Ninth Circuit

B. T. A. Docket No. 104687

LOMBARD TRUSTEES, LTD., a trust, and  
CHARLES S. LOMBARD, BERTHA M.  
LOMBARD and NORMAN M. LOMBARD,  
Trustees thereof,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,  
Respondent.

AGREED STATEMENT OF THE CASE  
ON APPEAL

Pursuant to Rule 76 of the Rules of Civil Procedure for the District Courts of the United States, the parties by their respective counsel, make and sign this Statement of The Case, as follows:

1. Petitioner timely filed with the Collector for the Sixth District of California a fiduciary return of income, Form 1041, for the calendar year 1937. In such return, petitioner's net income before any distribution to beneficiaries was reported to be \$23,014.05.

On June 15, 1940, respondent mailed to petitioner a notice of determination of deficiency in petitioner's income and excess profits taxes for 1937. In said notice, respondent stated:

“It is held that your organization is an association within the meaning of section 1001

of the Revenue Act of 1936 and as such you are taxable as a corporation upon your [1\*] net income for the period February 10, 1937 to December 31, 1937.

Since it is determined that your organization is an association taxable as a corporation for the period February 10, to December 31, 1937, the deduction claimed for the amount distributable to beneficiaries, \$23,014.05, is disallowed and there is eliminated the prorated net income for the period January 1 to February 9, 1937, after giving effect to adjustments (a), (b) and (c), in the amount of \$2,509.81, which amount is taxable to the grantor of the trust and is not a part of the net income of the association."

In said notice it was stated that respondent determined the net income for 1937 amounted to \$22,902.04; that respondent apportioned such income on a daily basis to February 10th, and that \$2,509.81 was the net income prior to February 10th and was taxable to the grantor of the trust and that \$20,392.23 was the net income after February 9th and was taxable to petitioner as an association at rates applicable to corporations and respondent determined there was a deficiency in income tax of \$5,001.09 and in excess profits tax of \$2,015.10.

2. Thereafter, petitioner petitioned the United States Board of Tax Appeals for a redetermination

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\*Page numbering appearing at top of page of original certified Transcript of Record.



of the deficiency found by respondent. The cause was heard at Los Angeles on June 10, 1941. At such hearing respondent filed an amended answer in which respondent alleged petitioner was an association taxable as a corporation during the entire year of 1937.

3. At said hearing the following were offered and received in evidence:

(a) Petitioner's said fiduciary return for 1937 wherein items of income, deductions and distributions to [2] beneficiaries were reported in the manner stated in the findings and opinion of the Board of Tax Appeals;

(b) Gift tax return of Dr. Charles S. Lombard for the year 1935, wherein he reported transfers to petitioner during 1935 of the parcels of property and with the respective values stated in the findings and opinion of the Board;

(c) Two stipulations, therein denominated as "Stipulation A" and "Stipulation B", respectively.

There was no other evidence and the cause was submitted on said fiduciary return, gift tax return and stipulations.

4. Attached hereto and respectively marked as hereinafter stated are the following:

Exhibit 1, being a copy of said Stipulation A (caption deleted and exhibits attached or incorporated by reference omitted from such copy and made separate exhibits);

Exhibit 2, being a copy of said Stipulation B (caption deleted);

Exhibit 3, being a copy of the conveyance and contract dated November 3, 1935 referred to in paragraph 3 of Stipulation A (property descriptions and notarial certificates omitted);

Exhibit 4, being a copy of the "instructions as to beneficiaries", dated November 3, 1935, referred to in paragraph 3 of Stipulation A; [3]

Exhibit 5, being a copy of the "request to vacate registration", dated February 10, 1937, referred to in paragraph 9 of Stipulation A;

Exhibit 6, being a copy of the resolution adopted March 14, 1937, referred to in paragraph 10 of Stipulation A;

Exhibit 7, being a statement of nature and contents of, with quotations from, the Amended Declaration of Trust, dated September 30, 1938, referred to in paragraph 13 of Stipulation A;

Exhibit 8, being a copy of Memorandum Findings of Fact and Opinion of Board of Tax Appeals, entered May 6, 1942;

Exhibit 9, being a copy of the Decision of said Board, entered June 19, 1942;

Exhibit 10, being a copy of the Petition for Review of Decision of Board of Tax Appeals, with its filing date.

5. The points relied on by petitioner on appeal are:

(a) Said decision is contrary to law in that

thereby income taxes for the year of 1937 are imposed upon petitioner in excess of any income taxes for which petitioner was liable;

(b) Said decision is contrary to law in that thereby excess profits taxes for the year 1937 are imposed upon petitioner and petitioner was not liable during said year for the payment of excess profits taxes;

(c) Said Board erred in finding petitioner was an association taxable as a corporation and erred in not finding that petitioner was a trust taxable as such; [4]

(d) Assuming but not admitting that petitioner was an association during some time in 1937, said Board erred in finding petitioner was an association during all of 1937, and erred in not finding petitioner was an association only subsequent to March 13, 1937;

(e) Said Board erred in holding the purpose of the trust involved was shown by and in the written declaration of trust and in rejecting and not considering other evidence of the purpose of the trust;

(f) Said Board erred in holding that the Board could not consider any evidence of the purpose of the trust other than that which appeared in the written declaration of trust, and

erred in not considering all evidence of purpose.

GEO. W. HELLYER

JOHN B. SURR

Attorneys for Petitioner

J. P. WENCHEL

Chief Counsel, Bureau of Internal Revenue, Attorney for Respondent

Approved and ordered filed:

(Signed)

MARION J. HARRON

Board Member [5]

### CERTIFICATE

I, B. D. Gamble, Clerk of the United States Board of Tax Appeals, do hereby certify that the foregoing pages, 1 to 5, inclusive, contain and are the agreed statement of the case made and entered into by the respective parties on review appearing by their counsel of record and that the copies of pleadings and proceedings attached thereto as exhibits are true copies of such proceedings, pleadings and exhibits as are on file in my office.

In testimony whereof, I hereunto set my hand and affix the seal of the United States Board of Tax Appeals, at Washington, in the District of Columbia, this 9th day of Oct., 1942.

B. D. GAMBLE,

Clerk, United States Board of Tax Appeals [5-A]

EXHIBIT 1

Stipulation A

It Is Hereby Stipulated and Agreed, by and between the parties hereto, through their respective counsel, that this cause may be submitted upon the following stipulation of facts, without prejudice, however, to the right of either party hereto to submit such additional evidence at the hearing before the Board as shall not be inconsistent with this stipulation of facts.

1. The use of the words, or terms, "trust", "trustor", "trustors", "trustee", "trustees", or similar expressions, in any instrument referred to herein, or in this stipulation, shall not be deemed an admission by any party as to the nature or legal effect of the instrument employing such terms, or an admission opposed to the contentions of such party, and the use of each and all such terms, shall be without prejudice to the right of any party to attribute to such words a meaning conforming to the contentions of the party.

2. Charles S. Lombard (commonly known as, and herein, for ease in identification, generally referred to as "Dr. Lombard") and Bertha M. Lombard (both of said persons being hereinafter sometimes called "trustors") intermarried on April 6, 1907, and at all times since have been, and now are, husband and wife and residents of the City of Redlands, San Bernardino County, California.

Three children were born of said marriage. Said children were surviving on November 3, 1935, and

still survive, their respective names and dates of birth being: [6]

Emily F. Lombard, born January 27, 1909.

Winthrop C. Lombard, born February 15, 1910.

Ruth Lombard Paul, born September 20, 1913.

Each of the said trustors had previously been married, and during the times hereinbefore referred to had children of the former marriage surviving.

On November 3, 1935, surviving children of Dr. Lombard's first marriage were:

Lillis L. Stowe, born August 18, 1883.

George S. Lombard, born January 18, 1885.

Charles Summer Lombard, Jr., born November 29, 1886.

Norman M. Lombard, born May 25, 1891.

On November 3, 1935, surviving children of Bertha M. Lombard's first marriage were:

Ralph M. Pray, born July 24, 1898.

Dorothy E. Pray, born August 17, 1900.

3. On November 3, 1935, at Redlands, California, Dr. Lombard and wife executed an instrument (therein and hereinafter termed "conveyance and contract"), of which a copy is attached to the petition herein and there marked "Exhibit A", and the same is incorporated herein by reference. At the same time, said conveyance and contract was also executed by Winthrop C. Lombard, Norman M. Lombard and Emily F. Lombard, who were therein termed "trustees".

At the time of the execution of said conveyance



and contract (Exhibit A of the petition), the said Norman M. Lombard executed an instrument (therein and hereinafter called "instructions as to beneficiaries"), of which a copy is attached to the petition herein, and there marked "Exhibit B", and the same is incorporated [7] herein by reference.

4. Said conveyance and contract (Exhibit A of petition) and said instructions as to beneficiaries (Exhibit B of petition) were executed as a part of and to evidence a single transaction and agreement, and both of said instruments are hereinafter referred to as the "trust declaration", and the arrangement thereby effected is hereinafter referred to as "a trust", or "the trust", without prejudice to the claims of any party respecting its effect, validity or taxability.

5. All parties to said trust declaration were residents of the State of California. All real property then or thereafter affected by or subject to said trust declaration was situate in the State of California and the situs of all personal property then or thereafter affected by or subject to said trust declaration was in said state. Said conveyance and contract was recorded in the office of the County Recorder of said County of San Bernardino on November 14, 1935, in Book 1108 of Official Records, at page 1 thereof.

6. On November 3, 1935, Emily F. Lombard and Winthrop C. Lombard resigned and ceased to act as or be trustees of said trust, and at the same time, Dr. Lombard and his wife were constituted and

made trustees of said trust, and at all times since, the trustees of said trust have been, and now are, Dr. Lombard, his wife and his son, Norman M. Lombard.

7. The property described in and transferred to said trustees by said conveyance and contract was a business property in said City of Redlands, then and since rented. From time to time after the execution of said trust declaration and prior to March 14, 1937, other real or personal properties were transferred to the [8] trustees by Dr. Lombard, without consideration. Included in said property so transferred were seven parcels of California real estate that were valued at \$128,500 in the 1937 gift tax return of Dr. Lombard. For the purpose of this case only, the approximate value of all property so transferred was \$300,000.

8. At the time of the establishment of the trust 600 of the "expectancy fractions" provided for in the trust declaration were registered on the records of the trustees in the name of Dr. Lombard.

9. A meeting of the trustees was held March 14, 1937. At such meeting, there was received by the trustees an instrument dated February 10, 1937, signed by Dr. Lombard and entitled "request to vacate registration". A copy of said instrument is hereto attached as Exhibit 1 and incorporated herein by reference.

10. At said meeting of trustees on March 14, 1937, the trustees adopted a resolution of which a copy is hereto attached as Exhibit 2 and incorporated herein by reference.



Pursuant to the request (Exhibit 1) and resolution (Exhibit 2) said 600 "expectancy fractions" were, on March 14, 1937, registered on the records of the trustees in the manner provided in said request (Exhibit 1).

11. A meeting of the trustees was held February 26, 1938. At such meeting there was received by the trustees an instrument dated February 25, 1938, signed by Dr. Lombard and wife, entitled "request to vacate registration". A copy of said instrument last mentioned is hereto attached as Exhibit 3 and incorporated herein by reference. [9]

12. At said meeting of trustees on February 26, 1938, the trustees adopted a resolution of which a copy is hereto attached as Exhibit 4 and incorporated herein by reference.

Pursuant to the request (Exhibit 3) and resolution (Exhibit 4), the 350 "expectancy fractions" theretofore registered in the names of Dr. Lombard and wife, as joint tenants, were on February 26, 1938, registered in the manner provided in said request (Exhibit 3).

13. On or about September 30, 1938, Dr. Lombard and wife, and the eight children in whose names "expectancy fractions" had theretofore been registered on the books of the trustees, executed and acknowledged an instrument in writing therein and hereinafter referred to as "Amended Declaration of Trust", of which instrument a copy is hereto attached as Exhibit 5 and incorporated herein by reference. Said Amended Trust Declaration (Exhibit 5) was recorded in the office of the County

Recorder of said San Bernardino County, on October 20, 1938, in Book 1297, page 386 of Official Records.

14. No transfers of "expectancy fractions" or of beneficial interests in the trust have ever been made, other than those made at the times, in the manner and by the instruments hereinbefore referred to. No "expectancy fractions" were ever registered in the records of the trustees, other than the 600 first registered in the name of Dr. Lombard and thereafter re-registered as hereinbefore set forth. All transfers of "expectancy fractions", or beneficial interests in the trust to said eight children, were made without consideration other than love and affection. [10]

15. On June 14, 1940, petitioner mailed to the Collector of Internal Revenue at Los Angeles a duly executed capital stock tax return on form 707 for the year ending June 30, 1937, wherein the value of petitioner's "capital stock" was declared to be \$150,000. With said return petitioner enclosed a check for payment of the tax, penalty and interest shown thereon and hereinafter stated. Said return was received by mail and filed with said Collector on June 15, 1940, and at said time petitioner paid said Collector the sum of \$213.75 for the following:

Capital stock tax for year ending June

30, 1937 .....	\$150.00
25% penalty for delinquency.....	37.50
Interest from August 1, 1937.....	26.25
<hr/>	
Total.....	\$213.75

The amount so paid has never been refunded to petitioner and no claim for refund has been filed or made.

16. On March 15, 1938, petitioner filed with the Collector of Internal Revenue at Los Angeles a duly executed fiduciary income tax return on form 1041, for the calendar year of 1937, reporting on a cash basis. Said return was verified by Dr. Lombard, who, after his signature to the affidavit, added the expression "mgr."

The net income of the trust, reporting on a cash basis, for the full calendar year of 1937, was the sum of \$22,902.04 (which is the amount determined by respondent), of which \$4,234.95 was income from dividends.

The net income of the trust, reporting on a cash basis, for the period February 10, 1937 to December 31, 1937 (both dates inclusive) was the sum of \$21,671.87, of which, \$3,333.55 was income from dividends.

The net income of the trust, reporting on a cash basis [11] for the period March 14, 1937 to December 31, 1937 (both dates inclusive) was the sum of \$8,482.39, of which, \$3,333.55 was income from dividends.

The provisions of this paragraph 16 are subject to the provisions of paragraph 18 of this stipulation.

17. Included in the property conveyed by the trustors to the trustees and held by the trustees at all times during the year of 1936 and thereafter, was a citrus orchard at Redlands, comprising in

area about 46 acres, part navels and part valencias. In the vicinity of Redlands, navel oranges mature so as to be marketable in late November or early December and are generally picked and marketed during the months of December, January, February, March and April. On January 1, 1937, there was on said orchard a matured crop of navel oranges that was sold and picked as hereinafter stated. On February 23, 1937, said navel crop was sold to Jameson Company for the sum of \$2.80 per hundred pounds, on the trees, the buyer to pick and haul, with the picking to commence March 1, 1937 and be fully completed by April 10, 1937. Said crop was picked by the buyer between March 1, 1937 and April 13, 1937. No expense was incurred or paid by the trustees or petitioner in connection with said crop after its sale on February 23, 1937. The trustees received for said crop the following amounts:

On February 23, 1937 (at the time of sale) .....	\$10,000.00
On March 10, 1937 .....	5,000.00
On April 15, 1937.....	1,868.96
	<hr/>
Total.....	\$16,868.96

[12]

18. In stating and in determining net income for different periods of 1937, as stated in paragraph 16 of this stipulation, each payment received for said navels was credited to gross income for the period in which received, and the entire proceeds from the navels in the amount of \$16,868.96 was

credited to gross income for the full year of 1937, and also for the period February 10th to December 31st, 1937, and \$1,868.96 of said proceeds was credited to gross income for the period March 14th to December 31st, 1937.

19. Subsequent to March 14, 1937, the only sales made by the trustees, apart from ranch products, were the following:

(a) On March 24, 1937, sold stock of American Trust Company costing \$5,189.44 for \$5,145.35 and bought stock of Baltimore American Insurance Company for \$5,133.75;

(b) On July 13, 1938, sold bonds of Kansas City School for \$5,520.75.

(Signed)           GEO. W. HELLYER  
                          Counsel for Petitioner

(Signed)           J. P. WENCHEL   FTH  
                          Counsel for Respondent

[Endorsed]: Filed at Hearing June 10, 1941.

[13]

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## EXHIBIT 2

### Stipulation B

It Is Hereby Stipulated and Agreed, by and between the parties hereto, through their respective counsel, that if Charles S. Lombard were called as a witness upon the hearing of this cause, he would testify (if permitted to testify over respondent's objection) as hereinafter set forth, provided that the Board considered such testimony material.

This stipulation is made subject to the objection of respondent to the admission of such testimony into the evidence, upon the ground that the testimony, and each part thereof, is immaterial, irrelevant and incompetent. The calling of said Charles S. Lombard and the giving of testimony is dispensed with. This stipulation may be offered and received at such hearing with the same effect as though the said Charles S. Lombard had been called and had testified over respondent's said objection, or had offered to testify as herein set forth, to which offer respondent had interposed said objection, and the objection had been sustained.

Following is said testimony:

1. I was born November 25, 1852, and at the time of executing the trust involved in this proceeding on November 3, 1935, was 83 years old.

My wife, Bertha M. Lombard, was born March 26, 1872. She is 19 years and 4 months my junior. At the time the trust was set up, there were living four children of my first marriage, their ages ranging from 52 years to 44 years. My oldest daughter of my first marriage is eleven years younger [14] than my wife and thirty years older than my youngest daughter by my said wife, Bertha.

2. At the time the trust was established, I owned real and personal property of the value of not less than \$300,000. In addition to our residence at Redlands, California, there were seven parcels of real estate consisting principally of property rented and used for business and a 46-acre orange ranch.

3. I desired and intended that the four children



of my first marriage, the three children of my second marriage, and my wife's daughter of her first marriage (which daughter had been making her home with us) making a total of eight children, should ultimately share alike in this property.

My oldest daughter stated and contended that the children of my first marriage should be preferred over the others as I had accumulated considerable property before my second marriage.

4. I had been devoting my full time and energy to the property. I desired to relieve myself of some of the responsibility, and I desired and needed help in managing it.

My wife and I wanted more leisure. We planned to travel.

I expected my wife to survive me, and I desired to provide her with an income for her support as long as she lived.

For a long time several of the children had been wholly and others partially dependent on me. I desired to give them economic freedom by providing each with an independent income.

Finally, after I was gone, I wanted the children to be able to sell the various properties and divide the proceeds from time to time as the market justified. [15]

I was induced by all of the foregoing reasons to create a living trust.

5. I learned of the form of a trust called the "Hulbert Plan trust" from Wilson Brothers of Redlands. They had adopted it and gave me a copy of the plan that I read. I then contacted Elton

Goble of San Bernardino, California. He was engaged in real estate and insurance and was also the representative of the publishers of the Hulbert Plan trust. He sold me the plan. The copyrighted, stereotyped form was adopted and executed without change.

6. On September 28, 1935, there was a meeting at my home at Redlands, attended by six of said eight children, my wife and myself. The intention of my wife and self to place part or all the property in trust and to use for such purpose the Hulbert Plan trust form was then made known to said children and the matter was discussed.

My oldest daughter, Lillis, aged 52, and my son, Charles Jr., aged 49, objected to the establishment of the trust without an opportunity to study and consider it. Previous to the meeting, papers had been prepared for execution. These were not then executed, but copies were made for the children.

7. The papers establishing the trust were executed about 36 days after the meeting referred to. Copies of these are attached to the petition in this matter and there marked "Exhibit A" and "Exhibit B". The full beneficial interest in the trust was registered in my name and remained so registered until March 14, 1937. [16]

8. By March 14, 1937, five of the eight children approved the trust and stated they were willing or desired to become beneficiaries, and on said date, a beneficial interest in the trust was registered to each of said five children. At said time, three of the right children had not approved.



9. About July 25, 1937, one of said three approved, and early in 1938, the other two approved. On February 26, 1938, a beneficial interest in the trust was registered to each of said three children.

10. At the time of executing the trust declaration (Exhibits A and B to petition), I did not consult or have the benefit of expert advice regarding trusts, gift taxes or income taxes. I made a gift tax return for the year 1935 in which I returned the property transferred to the trustees in 1935 and paid a tax thereon. On the advice of the Treasury, I subsequently made gift tax returns for 1937 and 1938, reporting the beneficial interests transferred during those years, respectively, and paying gift tax thereon. The Treasury refunded, or caused to be refunded, the gift tax paid for 1935.

11. In 1936, my wife and I traveled for several months, visiting among other places, Mexico City, New Orleans, New England, Canada, Yellowstone and Alaska.

In 1937 my wife and I went to Europe on a five months' trip, visiting England, Ireland, Scotland, Holland, Belgium, Hungary, Germany, Austria, Switzerland, Italy and France.

(Signed)           GEO. W. HELLYER  
Counsel for Petitioner

(Signed)           J. P. WENCHEL   FTH  
Counsel for Respondent

[Endorsed]: Filed at Hearing June 10, 1941. [17]

## EXHIBIT 3

## HULBERT PLAN

## Conveyance and Contract

Whereby to Establish (not create) Property in Absolute Ownership in Natural Person Trustees, Who for Convenience, Use a Trade Name (to be proprietary without creating a fictitious entity) Common to Them as a Board: Requiring Strict Accounting: Proclaiming the Limits of Their Financial Liability/ Accepting Notice of Injunction; Regarding as Sacred Their Contract Obligations Assumed in Good Faith: Agreeing to Administer for Conservation and to Fairly Apportion in Distributions; and in all Acting as Citizens May Under Common Law Rights of Contract and Federal Enactments Vouchsafed Since the Adoption of the Constitution of the United States of America and the Amendments Thereto, and Hereby Said Trustees Become Sole Owners of an Estate with no Restraints on Powers of Alienation.

(Copyrights, Hulbert Publishing Co., Chicago, Ill., 1935.)

Trade Name of the Board: Lombard Trustees, Ltd.

Executive Offices in: Redlands, California.

## Conveyance and Contract of Administration

This Four Part Instrument, made this 3rd day of November, A. D. 1935, is executed as to parties and subject matter, as follows:

## Exhibit 3—(Continued)

The parties hereto are hereby designated as Two Groups, namely: 1st. The Grantors who appoint the hereinafter named Trustees, and who convey, grant and deliver unto them property which is in part described herein, but schedules of which are provided and delivered; and, 2nd, the Trustees, who accept the appointment, who accept the property, and who then enter into a contract containing Articles of Administration as between themselves. Witnesseth:

## Appointment of Trustees

Charles S. Lombard and Bertha M. Lombard, husband and wife, herein designated as the Grantors, hereby select and appoint Winthrop C. Lombard, Emily F. Lombard, and Norman M. Lombard, Trustees, who, with possible associate and/or successor Trustees in event there be associate and/or successor Trustees, are by virtue of this instrument and for convenience in collective holding and bargaining and in their discretion, to act under and use in their collective and Board capacity the identifying and Trade Name of

## Lombard Trustees, Ltd.

The office of Trustee and the Trusteeship hereby established, with all the powers and rights thereto appurtenant, [18] shall and are hereby caused to extend to and rest upon such person or persons as in the discretion and judgment of the Trustees herein appointed, their survivors or survivors from their possible associate and/or successors, or in

## Exhibit 3—(Continued)

event there be no survivor then a Court of Equity shall select or appoint and install by such formal or informal method as, in their discretion, is hereinafter this instrument prescribed.

It is intended and hereby determined that the Trustees shall be unrestricted in their ownership, mastery, control, administration and disposition of the Estate, including real and personal property and all rights and privileges thereto incident or appurtenant, except as they themselves shall, by their own choice and in their own judgment and discretion, elect and adopt restrictions, rules and policies of business administration.

Under this instrument the Trustees named, their possible associate and/or successor Trustees in continuity, regardless of personnel, are Joint Tenants. (Not tenants in common) thus holding both their Trusteeship and all Estate properties.

## Conveyance

For and in consideration of the objects and purposes herein set forth, the cash sum of One Hundred and no/100 Dollars in hand paid, and other considerations of value, the receipt of which is hereby acknowledged, the said Grantors do hereby make, constitute and appoint the above named and designated Trustees, and their possible associate and/or successor Trustees in continuity, to be and they are hereby made, in fact, absolute and exclusive Owners, in their discretion to act under their designated Trade Name as such or in their

## Exhibit 3—(Continued)

individual names collectively, and do hereby sell, assign, transfer, convey and deliver unto said Trustees, and unto their associate and/or successor Trustees in continuity, rights and certain property, with power of sale and rights and powers to convey, mortgage, hypothecate and/or otherwise encumber and/or to convey by trust deeds without hinderance from, submission to, or approval of, beneficiaries hereunder, to constitute the initial Estate, which shall and is hereby made to include certain real and personal property of value, particularly described in schedules and inventories by the Grantors this day delivered to and now held by the said Trustees and with the understanding that no existing liens or obligations attached to any property they may accept or acquire or any part or portion thereof shall be assumed as financial obligations against the Estate Corpus or the Trustees. Except as the Trustees may expressly specify in writing.

## Deed

Charles S. Lombard and Bertha M. Lombard, husband and wife, for Ten Dollars (\$10.00) and other valuable considerations [19] of a total in value less than One Hundred (\$100.00) to them in hand paid, receipt of which is hereby acknowledged, do hereby grant, with power of sale, and power to convey, lease, mortgage, hypothecate, and otherwise encumber by mortgage, deed of trust or other forms of hypothecation and conveyance, unto

## Exhibit 3—(Continued)

Winthrop C. Lombard, and Emily F. Lombard, and Norman M. Lombard, Trustees, and unto their possible associate and/or successor Trustees, in continuity, in their discretion to act under, and with their identifying and Trade Name of “Lombard Trustees, Ltd.”, and unto their assigns, all of their and each of their rights, title, and interests in the following described real property located in the City of Redlands, County of San Bernardino, State of California, to wit:

(Here was description of real property.)

To have and to hold all and singular, the said premises together with the appurtenances unto said Trustees, their possible associate and/or successor Trustees, in continuity, including all the powers hereinbefore expressed and all those hereafter set forth in the Hulbert Plan Conveyance and Contract of which this is a part, and unto their assigns forever.

Witness our hands and seals this 3rd day of November, 1935.

CHARLES S. LOMBARD

BERTHA M. LOMBARD

(Here was Notary's certificate of acknowledgment.) [20]

## Acceptance

The said Trustees, for themselves and possible associate and/or successor Trustees, do hereby accept their appointment and their Offices of Trustees



## Exhibit 3—(Continued)

and do hereby accept the above described and referred to real and personal property, duly conveyed and delivered, and agree to conserve the Estate, to handle and barter, manage and administer it and such accretions thereto as may in future accrue, both real and personal, and, in their judgment and discretion to the best of their ability and as they interpret the meanings, purposes and obligations herein expressed, to carry out the spirit, tenor, intentions and purposes herein set forth, subject to the following Articles of Covenant, to wit:

## Contract Containing Articles of Administration

Each Trustee hereinbefore designated, for self and for possible associate and/or successor Trustees, hereby covenants and agrees with the other Trustees in Articles of Administration, to wit:

Art. 1. Board of Trustees: The Trustees shall be construed to be the absolute and exclusive owners, in joint tenancy and continuity, of the legal and equitable title to all property, real and personal, in the Estate, having powers including the right to convey and deliver any and/or all such Estate properties at will, and assuming as such Trustees the obligations of administration to which they have voluntarily subscribed.

The Trustees hereunder and as they may change in personnell, as provided herein, shall, in their collective capacity, be construed to be the Board of Trustees. The Board of Trustees shall not at any time exceed Five (5) in number, and the Trustees herein named, associate Trustees they may select

## Exhibit 3—(Continued)

and appoint to increase their Board, and possible successor Trustees, from time to time elected or appointed to fill vacancies as they may occur, shall hold their Trusteeship and joint tenancy Ownership of Estate properties in continuity, for the full life or term of this contract, unless removed by death, resignation, court order or a majority vote of their Board members for incompetence, fraud or gross neglect hereunder. Whenever vacancies occur the remaining Trustees may continue alone or they may elect new Trustee or Trustees to fill vacancies, and should the entire Board be vacated a Court of Equity may appoint Trustees. Whenever any such newly elected or appointed Trustee or Trustees shall have formally accepted such election or appointment, the Legal and Equitable Title to the Estate properties, real and personal, shall rest in the new together with the continuing Trustees, in joint tenancy and continuity, and not as tenants in common, and without any further act or conveyance. All resignations, removals, elections and/or appointments pertaining to Board Membership and Property Ownership shall be inscribed in the records of the Board of Trustees.

Art. 2. Board Acts and Meetings: The Trustees may act together informally over their individual signatures or in their Trade Name through duly authorized Officers of their Board. Names of Officers, [21] duties, appointments and authority delegated shall be duly described and inscribed in their Office Records, and the individual Trustees



## Exhibit 3—(Continued)

hereby agrees that the Board may authorize and delegate to, by proper resolution, any member or members of the Board of Trustees, the necessary authority to transact any and all business of the Trustees, including that which is necessary or incidental to the execution of deeds, conveyances and other instruments in writing on behalf of the said Trustees.

They may, by unanimous resolution, provide for holding periodical meetings without notice, and special meetings may be called at any time by a majority Or officials giving Five days written Notice to each Trustee. At any such regular or special meeting a majority of all the Trustees then constituting the Board shall constitute a quorum to transact business, their acts to be final unless an absent Trustee shall file a protest in writing with the Board Secretary within five days after receiving notice of such enactment. Such protest can be set aside or overruled by a majority of all the Trustees then constituting the Board of Trustees.

Art. 3. Powers: Being Natural Persons these Trustees, their associate and/or successor Trustees, shall organize themselves into a Board, and may do collectively, in their discretion, any lawful things which citizens may lawfully do in any or all States unless herein limited. (It should be remembered: "Corporations possess only such powers as are granted to them by law, while individuals possess all powers except those prohibited by law.") They may own real estate or personal property in any

## Exhibit 3—(Continued)

State without limit, may buy, sell, improve, exchange, assign, convey and deliver, may grant trust deeds and may mortgage or otherwise encumber for obligations; may own stock in or entire charters of corporations, and may engage the Estate funds and properties in any industry or investment in their discretion, hoping thereby to make gain to the Estate. They may delegate authority at will and resolutions of their Board recorded in Minutes of their meetings shall be good and sufficient evidence of their intentions and that their acts are within their powers, discretion and authority to perform.

Art. 4. Trade Name and Seal: The Trustees may and hereby do, without actual or pretended creation of a fictitious name, condition, for convenience in collective holding and bargaining, adopt and use a Trade Name and common Seal, for the purposes of identifying them collectively and as a Board, the style, design and manner of use of each being shown in the final execution of this instrument. The appearance of the Trade Name shall be construed to refer directly to the Natural Persons comprising this Group or Board and authorized to serve as Trustees hereunder. The form used herein in the final execution of this instrument is cited as a good form to follow when Trustees execute contracts and conveyances in their Trade Name, under Seal and in their Board capacity and indicates properly delegated authority. The Trade Name established hereby is a property possessed and owned by the Board Trustees. [22]

## Exhibit 3—(Continued)

Art. 5. Administration Rules: The Trustees may regard this instrument as their sufficient guide, supplemented by resolutions of their Board written into their office records to cover contingencies from time to time, or they may adopt formal by-laws or rules of business conduct when expedient, which shall be considered binding upon all Trustees and which may or may not be published.

Art. 6. Board Officials: It is advisable to elect presiding officer and to select and appoint a Board Secretary and/or other officials, to delegate duties and authority, and some Bank may be chosen as a depository, stipulating as to who may sign checks. This Board has selected and authorized its Board President and a Secretary, as shown in the final execution of this instrument, who are subject to changes in personnel in the discretion of the majority of the Trustees from time to time, and as shown in their records, wherein is also shown the degree of authority delegated to each officer in their Board and the location of the Board office and any changes from time to time shall be recorded therein.

Art. 7. Compensation: The Trustees shall fix and pay all compensation to officers, agents and employees in their discretion and may pay to themselves as Trustees, such reasonable compensation as may be determined by a regular act of their Board. Special attention is called to State and Federal regulations in the matter of employing and paying labor, to which these Trustees shall conform.

## Exhibit 3—(Continued)

Art. 8. Records: The Trustees shall keep a faithful record of all important transactions, inventories of all Estate properties, account of receipts, and disbursements, name and address of each known beneficiary, indicating therewith comparative ratios or fractions of expectancy; such general records, although private, to be available for examination of interested parties upon Court order or reasonable demand.

Art. 9. Property Holdings: Legal and Equitable Title to all Property in the Estate, real and personal, shall rest in the Trustees—members of the Board of Trustees as they appear in continuity—from time to time, in or identified by their Trade Name or in their individual names collectively, the residue to inure to survivors in their Board, and unaffected by death of any member, with power of sale and power to convey and deliver, and in confident expectation that their administration shall be in good faith.

All income and Estate funds, when collected or paid over to the Trustees, shall be construed to be part of the Estate Corpus from which the Trustees pay obligations, reinvest and/or distribute, in their discretion.

Art. 10. Personal Liability Limitations: These Trustees will follow precedent usual to acts of executors or Trustees of property established with them by will or otherwise, assuming as such Trustees only such obligations attached to the property

## Exhibit 3—(Continued)

they acquire as they particularly agree to assume, or resultant from their administration, and then only to the extent and value of the Estate funds and properties, but not personally to jeopardize their personal or separate [23] holdings or property of other Estates they may help to administer.

Art. 11. Publication of Notice: Filing this instrument in the public records of some County named and duly referred to shall be constructive Notice to the World of the specific personal liability limitations stipulated, and all persons, corporations or companies extending credit to, contracting with or having claims against the Estate or Trustees as the Owners thereof Must look only to the funds and properties of the Estate for payment or discharge of obligations. To this constructive notice the Trustees should supplement actual notice in writing contracts. The "Ltd." which appears in the Trade Name is a reminder to the "world" of "Limited Liability" of Trustees.

Art. 12. Fiscal Reports: The fiscal year of the Trustees shall end on the last day of each calendar year, at which time they should compile the annual summary of their records, disclosing assets and liabilities, receipts, disbursements and balance of funds carried, comparative profits and loss, with net inventories from which to render lists and financial statements; summaries may be given to each beneficiary of record, read at their meetings or otherwise published for information.



## Exhibit 3—(Continued)

Art. 13. Beneficiaries Meetings: The Trustees may, in their discretion, call the beneficiaries to meet annually or at other times, to hear and discuss reports and Forecasts, and while they may adopt resolutions of protest or commendation, no act of the beneficiaries as such shall be mandatory nor to justly question rights of the Trustees to exclusively manage the business affairs and control the Estate funds and properties.

Art. 14. Distributional Accounting System: In the "Hulbert Plan" there is no issue and sale of paper shares under that or any other name or pretense, nor any sale of interests in or fractions of the Estate; merely the expectancy thereunder being divided into fractions, the gross number being predetermined and designated in this contract and in entries in the Register of Beneficiaries which is used by the Board to list beneficiaries; such gross number never to be changed or increased. These fractions allotted As To beneficiaries in the register shall be the guide enabling the Trustees to properly apportion each distribution and the summary thereof shall not be construed to be an index to the intrinsic value of the Estate.

Art. 15. Registration and Dormant Fractions: Expectancy Fractions under this Administration shall at first be allotted in the records of the Board under instructions delivered to the Board by Norman M. Lombard. Should fractions appear dormant thereby, while held dormant they shall not be reckoned with when apportioning in distributions,

## Exhibit 3—(Continued)

such being computed solely by or upon the fractions registered As To beneficiaries at time of making each distribution. Dormant fractions, their usefulness being contingent upon possible future convenience, remain subject to the discretion of the Trustees.

Art. 16. Beneficiaries: The Trustees shall duly register every known beneficiary hereunder, devoting to each a separate entry in [24] their special Register of Beneficiaries. A Beneficiary Shall Be Construed to be as One Who Tenants Property, subject to and without affecting the discretion, management and/or absolute ownership of the Trustees in whom legal and equitable title to all Estate properties are Vested.

Death of a beneficiary shall not entitle the heirs or representatives to demand any partition of or interest in or distribution from Estate funds and properties, but the legal heirs may succeed to the expectancy As Of a decedent upon receipt by the Trustees of satisfactory information. The Trustees, thereupon, shall cancel the obsolete entry in such register and make new entry or entries therein for heirs of the deceased as new beneficiaries and permit such new beneficiaries thereafter to be duly considered when making subsequent distributions while they are so registered. Changes in beneficiaries from any cause shall be duly noted by the Trustees, who shall correct their register accordingly. Corrections shall be made in the register by cancelling the obsolete and making new entry or

## Exhibit 3—(Continued)

entries of record, and subsequent distributions shall be apportioned according to the changed register.

Art. 17. Distribution of Avails: The Trustees may at any time in their discretion and from any available funds in the Estate, make partial distributions and, ultimately, upon closure of the Estate, shall distribute the entire residual funds; all distributions to be apportioned to beneficiaries of record according to the number of fractions of expectancy appearing as credited to each as compared with the total number of fractions credited as to shall be apportioned according to the changed register.

Art. 18. Duration: Because rules against unlimited succession provoke eventual closure of this contract and Estate Holding, as a safeguard these Trustees adopt the following: This Contract and succession of Trustees and Property Holdings hereunder may continue indefinitely during any lawful term, in the discretion of the Trustees, except that no suspension of title or restraints upon alienation, should either arise hereunder, shall continue beyond a term not to exceed the life of the last surviving subscriber hereto or beneficiary registered under the terms of Article Fifteen herein.

Art. 19. Method of Closure: At time of closure the then acting Board of Trustees shall proceed to liquidate and convert into cash all the then existing assets, pay off all debts or should funds be insufficient, pay all in equal ratio, and shall distribute



## Exhibit 3—(Continued)

any Net residue to beneficiaries as provided; when such final distribution shall have been made and a notice to that effect is filed for record wherever this original instrument was previously recorded, announcing final closure, this Estate Holding shall cease and determine and the Trustees shall be automatically discharged; Provided, however, that any dissatisfied creditor may immediately invoke the good offices of a Court of Equity to review the settlement and approve the same or order adjustment of any error, tort or unfairness. [25]

Art. 20. Injunction—Limitations: The Trustees are hereby enjoined to refrain from any actual or pretended issue or sale of capital stock in or of their Estate, such being a corporation prerogative; nor shall they issue or sell shares, equities, units, fractions or undivided interests, legal, beneficial or equitable, in the Estate, either of which would be prejudicial to purity of Estate Holding and in contravention of the fundamentals of the "Hulbert Plan of Property Conservation and Administration" herein employed and adopted.

The Trustees shall not construe Expectancy Fractions, herein provided, to be property of which they are capable of making gifts or sales, nor is it possible to issue, offer for sale, or sell such Expectancy Fractions, they being provided for the convenience of the Board in Accounting and Apportioning in distributions, and do not express or imply property or property rights of any nature.

Art. 21. Amendments: While Conveyance and

## Exhibit 3—(Continued)

Delivery of Properties herein described and referred to is Irrevocable, should any part or portion of these articles of covenant, whatsoever, be construed by any Court to be contrary to or in contravention of law, it is the purpose and intention of all parties hereto, that in so far as this Conveyance and Contract is legal it shall continue in full force and effect and the Trustees shall operate thereunder. These Articles of Covenant for formal administration may be altered and/or amended at any time by the Full Membership of the then acting Board of Trustees jointly executing and attaching an appendix hereto, a copy of which with due reference hereto should be recorded in public records wherever this original instrument was previously recorded.

Art. 22. Taxation—License: These Trustees, being Natural Persons, have the constitutional right to transact business in any and every State free from requirements imposed upon artificial entities, but should the Trustees engage in a licensable occupation, they like other citizens, should and must procure the same license. These Trustees are to pay the usual taxes on their physical properties wherever located and assessed unless exempted, also their annual income tax unless exempted by reason of distributions to beneficiaries, as provided for under Income Tax regulations. Arrangements have been made for the use of the "Hulbert Plan" and all royalty is fully paid.

## Exhibit 3—(Continued)

Art. 23. Expectancy: For convenience in Accounting, Registration of Beneficiaries and Apportioning in Distributions, the entire Expectancy under this Administration (not the Estate Properties nor the income therefrom) is hereby divided into Twelve Hundred Fifty Fractions, each to be termed an Expectancy Fraction and expressed by numbers only, such gross number never to be changed or increased, nor shall the figures thereof be construed to be any index to or expression of the intrinsic value of the Estate or Properties whereof it is composed. [26]

In Witness Whereof, the said Grantors, for themselves, their heirs or assigns, have hereunto set their hands and seals in token of Assignment, Sale, Conveyance and complete Delivery of the properties named, referred to and/or described, and assent to all of the provisions expressed in the Articles of Administration as hereinabove set forth.

[Seal of Lombard Trustees, Ltd.]

(Seal) CHARLES S. LOMBARD

(Seal) BERTHA M. LOMBARD

And the said Trustees, for themselves and possible associate and/or successor Trustees have hereunto set their hands and seals in token of acceptance of their Office and Trusteeship as set forth, acceptance of the sale and delivery of the properties involved, and each does hereby assume the obligations and covenants as set forth in the Articles of Administration herein.

## Exhibit 3—(Continued)

Done at Redlands, California, the day and year in this instrument above written.

(Seal) WINTHROP C. LOMBARD

(Seal) NORMAN M. LOMBARD

(Seal) EMILY F. LOMBARD

The “Hulbert Plan” instruments are under copyright. Copyrights cover innovations. Infringers and plagiarists, beware of penalties. Mulbert Publishing Co., Chicago, Ill., 1935.

(Here was Notary's certificate of acknowledgment dated November 3, 1935.) [27]

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EXHIBIT 4

Fullerton, California,  
November 3, 1935

Board of Trustees  
Lombard Trustees, Ltd.  
162 The Terrace

Redlands, California

Gentlemen: Instructions as to Beneficiaries

Complying with the requirements to name Beneficiaries imposed upon me under the provisions of Article Fifteen (15) of the Conveyance and Contract, and to instruct you in the matter of the Registration thereof under your administration, please be guided by the following instructions:

You shall now please register Beneficiaries and show Fractions of Expectancy allotted as follows:

1. To Charles S. Lombard, when registered, allot Six Hundred (600) Expectancy Fractions. There remains Six Hundred Fifty dormant Expectancy Fractions subject to the terms and conditions of the Conveyance and Contract.

After complying with these instructions, it is my desire that there be no changes made in the register of beneficiaries, except;

1. To equitably register dormant fractions of expectancy whenever the same is justifiable pursuant to the terms of the Conveyance and Contract.

2. When you receive from an originally registered Beneficiary positive written instruction and/or waiver of Expectancy as to any change in his or her registration and/or that of his or her successor; and from a successor registered Beneficiary positive written instructions and/or waiver of Expectancy as to any change in his or her registration only.

3. In the event these instructions lack in clarity, then by the unanimous vote of the Trustees, the Board may order a change that conforms to these instructions.

Respectfully,

NORMAN M. LOMBARD [28]

## EXHIBIT 5

Redlands, California,  
Feb. 10, 1937.

Board of Trustees,  
Lombard Trustees, Ltd.,  
162 The Terrace,  
Redlands, California.

Re: Request to vacate registration.

Gentlemen:

This is to certify that I, Dr. Charles S. Lombard, am registered as a beneficiary of the administration of your Board of Trustees, identified under the Trade Name of Lombard Trustees, Ltd., and that I do hereby request that your said Board vacate in your Registry all the Expectancy Fractions registered as allotted to me on page 1 of your Registry amounting to 600 Expectancy Fractions, and that the said Expectancy Fractions be, when reregistered, allotted as to the following persons, in the following manner, and to the amounts as follows:

1. To Norman M. Lombard, whose address is 542 West Valley View, Fullerton, California, fifty (50) Expectancy Fractions.

2. To Winthrop C. Lombard, whose address is 162 The Terrace, Redlands, California, fifty (50) Expectancy Fractions.

3. To Emily F. Lombard, whose address is 162 The Terrace, Redlands, California, fifty (50) Expectancy Fractions; and Charles S. Lombard and Bertha M. Lombard, 162 The Terrace, Redlands,



California, as joint tenants, to be named as Contingent Beneficiaries.

4. To Ruth V. Lombard, whose address is 162 The Terrace, Redlands, California, fifty (50) Expectancy Fractions; and Charles S. Lombard and Bertha M. Lombard, 162 The Terrace, Redlands, California, as joint tenants, to be named as Contingent Beneficiaries.

5. To Dorothy M. Pray, whose address is 162 The Terrace, Redlands, California, fifty (50) Expectancy Fractions; and Charles S. Lombard and Bertha M. Lombard, 162 The Terrace, Redlands, California, as joint tenants, to be named as Contingent Beneficiaries. [29]

6. To Dr. Charles S. Lombard and Bertha M. Lombard, husband and wife, as joint tenants, the remaining three hundred fifty (350) Expectancy Fractions registered as allotted to me on Page 1 of your book, Registry of Beneficiaries.

The number of Expectancy Fractions originally registered as allotted to me was six hundred (600), and after you have approved and registered to the above-named persons as allotted to them the Fractions herein waived, there will remain registered as allotted to me and my wife, as joint tenants, three hundred fifty (350) Expectancy Fractions.

Thanking you kindly, I remain,

Respectfully yours,

CHARLES S. LOMBARD [30]

## EXHIBIT 6

Upon motion of Bertha M. Lombard, seconded by Norman M. Lombard, and unanimously carried, the following resolution was adopted:

Resolved, that this Board of Trustees accepts the waiver of Charles S. Lombard and above presented, and approves the request to register others as beneficiaries under our Estate, identified under the Trade Name of Lombard Trustees, Ltd., and hereby authorizes and instructs the Secretary to register Expectancy Fractions in our Registry of Beneficiaries in accordance with the request contained in the said Request, hereby approving the registrations as of the date of the Request, Feb. 10, 1937;

Further Resolved, That the individual members of this Board of Trustees approve the said registrations and the said waiver by individually signing these minutes at the close of this meeting. [31]

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EXHIBIT 7

Amended Declaration of Trust Nature, Contents,  
and Quotations

The parties were (a) Charles S. Lombard, Bertha M. Lombard and Norman M. Lombard, as trustees, and (b) Charles S. Lombard and Bertha M. Lombard, who were referred to as "donors", and the eight children referred to in paragraph 13 of Stipulation A, all in their individual capacities.

Exhibit 7—(Continued)

The amended declaration referred to in the conveyance and contract dated November 3, 1935, (therein and herein called "First Conveyance and Trust Declaration") and declared:

"It is now desired to amend said First Conveyance and Trust Declaration to read and provide as hereinafter set forth; and, irrespective of the validity, meaning and effect of said First Conveyance and Trust Declaration, to provide that all property transferred to, or intended to be transferred to, and now held, or believed to be held, by said trustees, shall hereafter be held, used and disposed of upon the trusts and for the purposes hereinafter set forth, without power or right in any person of revocation or further amendment."

In the Amended Declaration it was provided that the Amended Declaration should be and was "substituted for, and shall be and is, a novation of said First Conveyance and Trust Declaration" and "That the provisions of said First Conveyance and Trust Declaration shall be of no further effect and need not hereafter be considered or reverted to for any rights of the parties or the terms of the trust upon which any property is held."

Said Amended Declaration provided in the event of a [32] vacancy in the office of trustee, it should be filled by appointment of the surviving trustees, except that two children there named should be first appointed.

## Exhibit 7—(Continued)

Following are excerpts from the Amended Declaration, Articles II and III being set forth in full:

## “Article II

## Purpose and Irrevocability

Section 1. Purpose. The donors' purpose in establishing said trust was and is to relieve the donors (at least in part) of the responsibility of looking after said property; to provide for the maintenance, comfort and general welfare of said children beneficiaries, and to secure them and their families against privation and want, by sharing said income with said children beneficiaries and ultimately dividing said property or the proceeds from its liquidation and sale among said children beneficiaries, thereby providing each with an estate to be held thereafter and enjoyed in absolute ownership.

Section 2. Trust Irrevocable. Said trust shall be and is made irrevocable, and neither the donors, nor either of them, nor any beneficiary, shall have any right to revoke, modify, alter or change this trust or any provision of this Declaration of Trust.”

## “Article III

Distribution of Income and Principal  
and Termination

Section 1. Apportionment of Trust Estate. The trustees shall immediately apportion the trust estate, without being required to make a physical segregation thereof, into shares, and shall allot the same as follows:

Exhibit 7—(Continued)

(a) Two shares, each share equal to one-sixth of the whole estate, one to Charles S. Lombard (one of the donors) and the other to Bertha M. Lombard, his wife;

(b) Eight shares, each equal to one-twelfth of the whole estate, one of said twelfth shares to each of said children beneficiaries.

The person entitled at any time to the income from a share will be referred to herein as “owner” of such share, without regard to the extent of the interest or estate of such person in such share, whether a life estate or other. Whenever any distribution of principal or income is made, the same pro rata distribution shall be made in respect of all shares. [33]

Section 2. Net Income. The term “net income”, as herein used, shall be deemed the same as the taxable net income under the then applicable Federal Revenue Act imposing a tax upon incomes, and such net income for any year shall be determined in the same manner in which the taxable net income for that year is determined.

Section 3. Distribution of Net Income. The annual net income from a share shall be distributed annually to the owner or owners of such share, as hereinafter in Section 5 of this Article provided, during the tax year in which such income is received, subject to repayment of advances made, or loss or expense sustained by the trustees, or a trustee, with interest thereon as provided in subdivision (e) of Article IV

## Exhibit 7—(Continued)

hereof. The time, or times, of such distributions shall be determined by the trustees, who may, in their discretion, budget the estimated annual net income in order to equalize, so far as practicable, periodical income payments. If actual distribution of the net income during the year of origin be impracticable for any reason, whether inability to compute the same until after the close of the year, lack of available funds, or other cause, the owner of a share, at the close of such year, shall be credited as of the last day of such year with the amount to which he or she is entitled under the foregoing provisions and which has not been actually distributed to him or her, and the amount so credited shall constitute a liability of the trust, payable without interest out of the trust estate as soon as, in the judgment of the trustees, payment can be made. An owner shall be entitled absolutely to receive the amount so credited to him or her. Such right to receive income that has been credited shall be alienable, and it shall not be impaired by the death of such owner, anything to the contrary elsewhere in this Indenture contained.

It is the intent hereof that the net income from a share during any year shall be returned for income tax by its owner, or owners, and shall be included in computing the net income of such owner or owners. If for any reason, under any present or future law, application



## Exhibit 7—(Continued)

of the foregoing paragraph providing for crediting such part of said net income as shall not be actually paid would result in making any part of said net income taxable to the trust by depriving the trust or trustees of the right to a deduction equal to, or not less than, the amount so credited, then such provision for crediting the part of said net income not actually paid shall be inoperative, and the annual net income from the respective shares shall under all circumstances be distributed to the respective owners during the year of its origin.

Section 4. Distribution of Principal and Additional Income. The donors desire to authorize and make possible the conversion to cash of all the trust estate, and the dis- [34] tribution of such cash among the beneficiaries. In the opinion of the donors, precipitate liquidation of the properties of the trust is inadvisable, and it is in the interests of the beneficiaries that distributions to them be gradual, giving each an opportunity to school himself by experience in the handling and conservation of property; and finally, if it shall transpire that the children beneficiaries, or any of them, by reason of improvidence or otherwise, are apt to need financial assistance in their advanced years, there will still remain in the trust some property to provide an income sufficient to keep them from actual want.

Accordingly, in addition to the distribution of

## Exhibit 7—(Continued)

net income, as provided for in the preceding section, the trustees may, from time to time, from any cash constituting the corpus of the trust estate, distribute such cash to and among the then beneficiaries in the same proportions and relative amounts of net income.

The trustees may also, from time to time, distribute any real or personal property constituting a part of the trust estate to and among the then beneficiaries in proportion to their respective interests. Such distributions shall be known as partial distributions, and the provisions of paragraph (h) of Article IV shall be applicable.

The trustees may also, in order to provide for the reasonable care, education, or comfort of any beneficiary in case of dire need or distress, make partial distributions of principal to any one or more beneficiaries, provided any such partial distribution to a single beneficiary shall be charged against and reduce pro tanto the share of the trust estate of such beneficiary.

Nothing in this section shall be deemed to prevent the trustees from investing or re-investing any moneys at any time in the trust. The discretion of the trustees respecting the distributions in this section authorized shall be absolute and not controlled by the desires of the beneficiaries or by any court or judge.

Section 5. To Whom Distributions Made. All amounts distributed pursuant to the provisions of Sections 3 and 4 of this Article,

Exhibit 7—(Continued)

whether of net income, principal, or other income or tangible property, shall be paid or distributed to the persons and in the proportions, as follows (any person being entitled only to those distributions actually made during his or her life and after the right accrued), to wit:

(a) Distribution upon or in respect of the one-sixth share apportioned to Charles S. Lombard shall be made to the said Charles S. Lombard during his life and thereafter to Bertha M. Lombard, his wife, if living, for the remainder of her life, and thereafter, the same shall be added to and augment equally the then unlapsd shares apportioned to the [35] children beneficiaries.

(b) Distributions upon or in respect of the one-sixth share apportioned to Bertha M. Lombard shall be made to the said Bertha M. Lombard during her life, and thereafter as follows:

Said one-sixth share shall be divided into two shares (without physical segregation) of two-thirds and one-third, respectively. Said two-thirds share (being one-ninth of the entire trust estate) shall be apportioned to Ralph M. Pray, his issue and spouse, and distributions in respect thereof, whether of income or corpus, shall be made to the said Ralph M. Pray, if and while living, and after his death to his from time to time then living lawful issue, upon the principle of representation, and in default of issue at any time to take, then to his spouse, if any,

## Exhibit 7—(Continued)

during the remainder of the life of such spouse, and in default of both issue and spouse to take at the time of any distribution, then such one-ninth share so apportioned for Ralph, his issue and wife, shall be deemed to have lapsed and shall be added to and augment equally the then unlapsed shares apportioned to other children beneficiaries.

The-one-third share (being (1/18th of the entire trust estate) shall be added to and augment equally the then unlapsed shares apportioned to the children beneficiaries.

(c) Distribution upon or in respect of a share apportioned for a child beneficiary shall be made to such child beneficiary during his or her life, and from and after the death of a child beneficiary, to his or her, from time to time, living lawful issue, upon the principle of representation, and in default of issue at any time to take, then to the spouse of such deceased child beneficiary, if any, during the remainder of the life of such spouse, and in default of both issue and spouse to take at the time of any distribution, then such share shall be deemed to have lapsed and shall be added to and augment equally the then unlapsed shares apportioned to other children beneficiaries.

Section 6. Final Distribution Upon Termination. Upon termination of the trust, any undistributed principal and income of a share shall go and be distributed to those who at the time

## Exhibit 7—(Continued)

of such termination would have been entitled to receive any distribution of net income had a distribution been then made, except that the principal and income of the share of the last survivor of said children beneficiaries (and whose death caused the termination of the trust) shall go and be distributed in the same manner that income from such share would have been distributable immediately after the death of such child beneficiary had the trust been then continuing.

Section 7. Restraint on Alienation. Each beneficiary hereunder is hereby restrained from anticipating, [36] encumbering, alienating, or in any other manner assigning his or her interest or estate in either principal or income, and is without power so to do, nor shall such interest or estate be subject to his or her liabilities or obligations, nor to judgment or other legal process, bankruptcy proceedings, or claims of creditors or others. All income or principal shall be payable and deliverable only and personally to the respective beneficiaries entitled thereto. This trust is intended to provide for the maintenance of each beneficiary entitled to received either income or principal hereunder.

Section 8. Termination of Trust. The trust shall terminate upon the first happening of:

(a) Complete distribution among the beneficiaries of the last of the trust estate (both principal and income); or

## Exhibit 7—(Continued)

(b) The death of the last survivor of the donors and the children beneficiaries.

The duration of this trust shall in no event, nor by any possibility, extend beyond the death of those beneficiaries who were in being upon the date of this Indenture.”

## “Article V

## General Provisions

Section 5. Minors and Incompetents. The trustees may make payments of any income or principal payable to or applicable to the use of any minor or incompetent beneficiary by making such payments to the guardian of the person of such minor or incompetent, or to the parent of such minor, or directly to such minor, or may apply the same for the benefit of such minor or incompetent.

Section 6. Adopted Children. The term “child”, “children” or “issue” as used herein, shall include legally adopted children.

Section 7. Laws of California Applicable. This Indenture has been executed and this trust has been accepted by the trustees in the State of California, and its validity, construction and all rights under it shall be governed by the laws of said state.” [37]



EXHIBIT 8

United States Board of Tax Appeals

LOMBARD TRUSTEES, LTD., a trust, and  
CHARLES S. LOMBARD, BERTHA M.  
LOMBARD, and NORMAN M. LOMBARD,  
Trustees thereof,

Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE,  
Respondent.

Docket No. 104687

George W. Hellyer, Esq.,  
for the petitioner.

Frank T. Horner, Esq.,  
for the respondent.

MEMORANDUM FINDINGS OF FACT  
AND OPINION

Harron: Respondent originally determined deficiencies of \$5,001.09 and \$2,015.10 in petitioner's income tax and excess profits tax, respectively, for the year 1937. Respondent determined that petitioner was an association within the meaning of section 1001 of the Revenue Act of 1936, during the period from February 10 to December 31 of 1937, and, as such, was taxable as a corporation. By an amended answer filed at the hearing, respondent made claim for increases in the deficiencies based upon the contention that petitioner was an association during the

## Exhibit 8—(Continued)

entire year of 1937. Respondent now claims that the income tax deficiency is \$5,818.66, and that the excess profits tax deficiency is \$2,316.28. The main question is whether petitioner is an association, and, as such, taxable as a corporation. The facts have been stipulated.

## FINDINGS OF FACT

Petitioner filed a fiduciary return, Form 1041, for the calendar year 1937 with the collector for the sixth district of California. [38]

Charles S. Lombard, hereinafter called Dr. Lombard, and Bertha M. Lombard were married in 1907, and they reside in Redlands, California. Three children were born of this marriage. Each person had been married before and each had children of the previous marriage. The children of Bertha Lombard's first marriage were Ralph Pray, born in 1898, and Dorothy Pray, born in 1900. The children of Dr. Lombard's first marriage were Lillis Stowe, 1883; George Lombard, 1885; Charles S. Lombard, Jr., 1886; Norman Lombard, 1891. The children of Bertha and Charles Lombard were Emily Lombard, 1909; Winthrop Lombard, 1910; Ruth Lombard Paul, 1913. All of the nine children were living on November 3, 1935.

Dr. Lombard was born in 1852. He was 83 years old in 1935. Bertha Lombard was born in 1872. In 1935, she was 63. In 1935, the ages of the above children ranged from 52 to 22 years. In 1935 Dr. Lombard owned real and personal property having a

## Exhibit 8—(Continued)

value of about \$300,000. The real property included 7 parcels of real estate which were rented for business purposes and a 46-acre orange grove.

In 1935 Dr. Lombard learned of a copyrighted printed plan called the "Hulbert Plan Trust" which was sold by a representative of the publishers in San Bernardino. He purchased one of the printed forms of the plan. On November 3, 1935, Dr. Lombard and Bertha Lombard, as grantors, and Winthrop, Emily, and Norman Lombard, as trustees, executed the "Hulbert Plan Trust". Thereafter, from that date through the taxable year 1937, that agreement was opera- [39] tive and in full force and effect. On November 3, 1935, Dr. Lombard conveyed to the trustees one parcel of business property, and subsequently, during 1935 he conveyed to the trustees several other pieces of business property, including an orange grove. On November 3, 1935, the same day that the agreement was executed, two of the trustees resigned, Emily and Winthrop Lombard. Dr. Lombard and Bertha Lombard became the successor trustees, and they, with Norman Lombard, have acted as trustees ever since then. The conveyance and agreement of November 3, 1935, was recorded on November 14, 1935, in the office of the recorder for San Bernardino County. All of the parties thereto were residents of California, and all of the property conveyed to the trustees under the agreement was located in California.

The "Hulbert Plan" which was executed was a series of legal instruments rather than a trust in-

## Exhibit 8—(Continued)

denture. The first instrument is entitled "Conveyance and Contract" and it was executed by Charles S. and Bertha M. Lombard. By this instrument they, as "grantors", appointed three trustees who were to use in their collective capacity the trade name of Lombard Trustees, Ltd. Also, they conveyed to the "trustees", for \$100 and other valuable consideration, property described in a "deed" which was made a part of the instrument. Also, they sold, assigned, and conveyed the particular property to the "trustees" as joint tenants and as "the exclusive owners" with power to sell, mortgage, and encumber the property, in their own discretion, "without hindrance from, submission to, or approval of "beneficiaries". It was stated that the "trustees" should be unrestricted in their ownership, control, [40] administration, and disposition of the "estate".

The second instrument was executed by both the "grantors" and the "trustees". It comprises an "Acceptance" by the "trustees" and a "Contract containing Articles of Administration", to which the "trustees" agreed. The "trustees" accepted their appointment and the property conveyed to them, and they agreed to "conserve", "handle and barter", "manage and administer", the property and its accretions.

The "trustees" agreed with each other in "Articles of Administration". The "Articles of Administration" provided that the "trustees" should "be construed to be the absolute and exclusive owners, in joint tenancy and continuity, of the legal and

## Exhibit 8—(Continued)

equitable title to all property, real and personal in the Estate." It set forth authorization to the "trustees" to act in their trade name through authorized officers; to be a "Board of Trustees" in their collective capacity; to hold regular and special meetings; and to adopt and use a seal. The "Articles of Administration" set forth the general powers of the "trustees", as follows:

Art. 3. Powers: Being Natural Persons these Trustees, their associate and/or successor Trustees, shall organize themselves into a Board, and may do collectively, in their discretion, any lawful things which citizens may lawfully do in any or all States unless herein limited. (It should be remembered: "Corporations possess only such powers as are granted to them by law, while individuals possess all powers except those prohibited by law.") They may own real estate or personal property in any State without limit, may buy, sell, improve, exchange, assign, convey and deliver, may grant trust deeds and may mortgage or otherwise encumber for obligations; may own stock in or entire charters or corporations, and may engage the Estate funds and properties in any industry or investment in their discretion, hoping thereby to make gain to the Estate. They may delegate authority at will and Resolutions of their Board recorded in Minutes of their meetings shall be good and sufficient evidence of their intentions and that their acts are within their powers, discretion and authority to perform. [41]

Under the "Articles of Administration" the per-



## Exhibit 8—(Continued)

sonal liability of the “trustee” was limited, the “trustees” assuming only such obligations attached to the property acquired “as they particularly agree to assume”, or which might result from their “administration” of the property, and then “only to the extent and value of the Estate funds and properties, but not personally to jeopardize their “personal property. Also, the “trustees” were required to keep records; to make up financial reports annually; and to allot in the records “expectancy fractions” under instructions to be delivered by Norman Lombard, one of the “trustees”. The “trustees” were “enjoined to refrain from any actual or pretended issue or sale of capital stock in or of their Estate, such being a corporation prerogative”. Also, the “trustees” were not to issue or sell any equities or beneficial or equitable interests in the estate.

Nowhere in the “Hulbert Plan” which was executed is there a conveyance to trustees for the benefit of cestuis que trust. While the plan contemplated that “expectancy fractions” should be “allotted as to beneficiaries”, as a matter of record only, in a “Register”, it is provided that such allocation shall be a “guide” to enable the “trustees” to properly “apportion each distribution”. The matter of allotting “expectancy fractions” meant no more than making a record of who was entitled to receive distributions, and the proportion each would receive, if, as, and when any distributions were ever made, which was entirely within the discretion of the “trustees”.



## Exhibit 8—(Continued)

The "Articles of Administration" left to the discretion of [42] the "trustees" the matter of making partial distributions from any available funds in the "Estate", but any distributions were to be made in proportion to the number of "fractions" credited on the books to each "beneficiary". Also, the matter of liquidating the "Estate" and making final distribution of the property to the "beneficiaries", was left within the discretion of the "trustees".

The "Articles of Administration" left to the discretion of the "trustees" the matter of making partial distributions from any available funds in the "Estate", but any distributions were to be made in proportion to the number of "fractions" credited on the books to each "beneficiary". Also, the matter of liquidating the "Estate" and making final distribution of the property to the "beneficiaries", was left within the discretion of the "trustees".

The third instrument which was executed was the direction from Norman Lombard to the "Board of Trustees" to register Charles S. Lombard as a "beneficiary" and to allocate to him 600 "expectancy fractions" out of a total of 1,200, leaving 600 dormant "expectancy fractions."

All of the above described instruments were executed November 3, 1935.

The transfers of property to the "trustees" were irrevocable. The "trustees" were to hold the property until they decided to liquidate, but the longest period was fixed, so as not to violate the rule against perpetuities, by the life of the last surviving sub-

## Exhibit 8—(Continued)

subscriber to the agreement or registered “beneficiary”.

[43]

The persons registered as having “expectancy fractions” could be changed. On February 10, 1937, Dr. Lombard requested in writing that the board of trustees of petitioner vacate the registration of the 600 “expectancy fractions” in his name and re-allocate and re-register them. He requested that 350 fractions be re-registered in the name of himself and Bertha Lombard, as joint tenants, and that 50 fractions each be registered in the names of Norman, Winthrop, Emily, and Ruth Lombard, and Dorothy Pray. At a meeting of the board of trustees on March 14, 1937, a resolution was adopted approving the request and the secretary was directed to register the new beneficiaries in accordance with the request. The resolution stated that the board of trustees approved “the registrations as of the date of the Request, February 10, 1937.” The registrations were made in the register on March 14, 1937. The re-registrations in the names of the various beneficiaries were made without consideration.

On February 25, 1938, Dr. Lombard and Mrs. Lombard requested the petitioner’s board of trustees to vacate the “expectancy fractions” registered in their names, (350), and to re-register and re-allocate the fractions, 200 to themselves as joint tenants, and 50 fractions, each, to George S. Lombard, Charles S. Lombard, Jr., and Lillis S. Stowe. It was requested that the fractions allocated to

Exhibit 8—(Continued)

George S. Lombard should be registered as of July 25, 1937, and that the fractions allocated to Charles S. Lombard, Jr., should be registered as of January 29, 1938. At a meeting of the trustees on February 26, 1938, a [44] a resolution was adopted approving the request. The reregistrations were made in accordance with the request.

No other re-allocations and reregistrations of “beneficial interests” have been made.

Dr. Lombard filed a gift tax return for 1935. In it he reported transfers of property to Lombard Trustees, Ltd., and he placed values thereon as follows:

1. November 3, 1935, real property, Redlands	\$5,610.00
2. November 19, 1935, real property, lot, Redlands .....	24,190.00
3. November 19, 1935, real property, lot and building, Redlands .....	17,540.00
4. November 19, 1935, real property, lots.....	13,830.00
5. November 19, 1935, real property, lot and filling station Riverside.....	810.00
6. November 19, 1935, real property, 4 lots, San Diego .....	2,500.00
7. November 19, 1935, real property, orange grove Redlands .....	2,000.00
8. December 31, 1935, stocks.....	64,587.93
	<hr/>
	\$131,067.93

Several of the pieces of real estate conveyed to petitioner by Dr. Lombard are business properties, stores and offices, which are rented. In the taxable year 1937 these business properties and the orange grove produced income which was reported by

## Exhibit 8—(Continued)

petitioner on Form 1041, "fiduciary income tax return."

During the taxable year, 1937, petitioner received income from the property it held from rents, dividends, and the operation of the orange grove as follows:

Dividends .....	\$4,234.95
Interest on bank deposits.....	200.00
Rents—net—after repairs, depreciation and expenses .....	14,230.65
Receipts from orange grove—net—proceeds from sale of oranges .....	10,048.12
Total .....	<u>\$28,713.72</u>

[45]

In the fiduciary income tax return filed by petitioner, it reported net income, after deductions, in the amount of \$23,014.05. Among the deductions taken were the following: Interest paid on note for \$39,000, \$2,025.52; taxes—city and county taxes on property, \$155.92, state income tax, \$137.50, social security tax, \$14.94, total, \$308.36; miscellaneous expenses, \$425.68; salaries, \$2,904.84.

Petitioner attached to the fiduciary income tax return, Form 1040 F. "Schedule of Farm Income and Expenses". On this return petitioner reported \$24,634.95 from the sale of oranges and \$494.66 from receipts from "water and pipeline" and miscellaneous, and total expenses of \$15,081.49, leaving net receipts of \$10,048.12.

The expenses of operating the orange grove included wages, fertilizers, and spraying materials,

Exhibit 8—(Continued)

fuel, taxes, insurance, water rent, smudge oil, tractoring, telephone, and repairs.

Petitioner reported in the fiduciary income tax return as the distributable income of the registered beneficiaries, total net income, as follows:

Norma Lombard .....	\$1,917.84
Emily Lombard .....	1,917.84
Ruth Lombard .....	1,917.84
Winthrop Lombard .....	1,917.84
George Lombard .....	1,917.84
Charles S. Lombard .....	5,753.51
Bertha Lombard .....	5,753.50
Dorothy Pray .....	1,917.84
	<hr/>
	\$23,014.05

[46]

The oranges grown were part Valencia and part navel oranges. In the vicinity of Redlands, navel oranges mature so as to be marketable in late November or early December, and are generally picked and marketed during the months of December, January, February, March and April. On January 1, 1937, there was on the orchard a matured crop of navel oranges. On February 23, 1937, the navel crop was sold for the sum of \$2.80 per hundred pounds on the trees, the buyer to pick and haul, with the picking to commence March 1, 1937, and to be completed by April 10, 1937. The crop was picked by the buyer between March 1, 1937, and April 13, 1937. No expense was incurred or paid by the trustees or petitioner in connection with the crop after its sale on February 23, 1937. The



## Exhibit 8—(Continued)

trustees received for the crop the following amounts: On February 23, 1937, \$10,000; on March 10, 1937, \$5,000; on April 15, 1937, \$1,868.96; total, \$16,868.96. In stating and determining the net income for different periods of 1937 above, each payment received for the navels was credited to gross income for the period in which received.

Subsequent to March 14, 1937, the only sales made by the trustees apart from ranch products were the following: (a) On March 24, 1937, sold stock of American Trust Company costing \$5,189.44 for \$5,145.35 and bought stock of Baltimore American Insurance Company for \$5,133.75; (b) on July 13, 1938, sold bonds of Kansas City School for \$5,520.75.

On June 14, 1940, prior to the mailing of the notice of deficiency herein, petitioner mailed to the collector of internal [47] revenue, Los Angeles, a duly executed capital stock tax return, on form 707, for the year ending June 30, 1937, wherein the value of petitioner's "capital stock" was declared to be \$150,000. Petitioner enclosed a check in the total amount of \$213.75 for the payment of the capital stock tax, \$150; the 25 percent penalty for delinquency, \$37.50; and interest from August 1, 1937, \$26.25. The amount so paid has never been refunded to petitioner, and no claim for refund has been filed or made.

The petitioner's adjusted net income for the entire calendar year 1937 was \$22,902.04, of which \$4,234.95 was from dividends.



## Exhibit 8—(Continued)

A trust at law was not created by Dr. Lombard by his execution on November 3, 1935, of the several instruments constituting the Hulbert Plan, and petitioner was not a trust prior to or during the taxable year. Rather, some type of enterprise in the nature of a family corporation was created under the Hulbert Plan. Dr. Lombard transferred absolute title, legal and equitable, to various properties, real and personal, to himself, Norman Lombard, and Bertha Lombard, as joint tenants. They, and they only, were the equitable as well as the legal owners of the property. They and their successors, only, could determine who should eventually receive distribution of the property upon liquidation of the enterprise.

During the taxable year, 1937, petitioner was an association within the meaning of section 1001 of the Revenue Act of 1936. [48]

## OPINION

The main question is whether petitioner was an association during all of 1937, and, as such, taxable as a corporation. During 1937 the "Hulbert Plan" which was executed in November of 1935 was in effect, and no supplemental agreement or amendment thereto was in existence. Accordingly, the question must be determined upon consideration of the terms of the 1935 agreement. Also, the burden of proof is upon petitioner to show that it was not engaged in business enterprises for profit, or that it did no more than conserve trust property with

## Exhibit 8—(Continued)

the necessary incidental activities of a trustee. Petitioner has introduced very little direct evidence relating to its activities with respect to the various properties it held. However, the income tax return filed by petitioner does set forth much which is indicative of petitioner's activities.

Respondent has determined that petitioner is an association, taxable as a corporation. Section 13 of the Revenue Act of 1936 levies a tax upon the net income of corporations, and section 1001 (a) (2) provides that the term "corporations" includes "associations."

The Supreme Court, in *Morrissey v. Commissioner*, 296 U. S. 344, has set forth many tests to apply in the determination of the question. The Court pointed out the characteristics which distinguish a "business trust" from the traditional type of trust. In *Porter Property Trustees, Ltd.*, 42 B. T. A. 681 (on appeal to Circuit Court of Appeals for the Ninth Circuit), we had to analyze the provisions of an agreement under which *Porter Property Trustees, Ltd.* [49] had been created. It happens that there, as here, the so-called "Hulbert Plan" was the agreement. Applying the criteria of the *Morrissey* case, we concluded that the facts indicated "a family corporation which it was thought could be operated as a trust under the so-called Hulbert Plan, without paying corporate rates," p. 690, and we held that the petitioner was an association, and therefore, that it was taxable as a corporation. Respondent, in this case, relies

## Exhibit 8—(Continued)

upon the conclusions reached in Porter Property Trustees, Ltd. The situation here is much the same as in the cited case. It is not material that there is absent in this case a step which preceded the “trust” arrangement in the Porter case, namely, ownership of the property by a corporation before the execution of the “trust” agreement. The Porter case is followed here in all that was said of the application of the tests set forth in the Morrissey case, which need not be repeated.

However, each case should be considered upon its own facts, and it appears to be necessary to discuss here the terms of the agreement under which petitioner acted so as to point out why, again, we must hold that such terms as the “Hulbert Plan” is made of can lead to no other conclusion than that it creates an association rather than the traditional trust. In this respect, the consent about the definition of “association” made by the Supreme Court in *Hecht v. Malley*, 265 U. S. 144, 44 Sup. Ct. 462, 467, is pertinent:

The word “association” appears to be used in the Act in its ordinary meaning. It has been defined as a term ‘used throughout the United States to signify a body of persons united without a charter, but upon the method and forms used by incorporated bodies for the prosecution of some common enterprise’. [50]

It is rudimentary that every trust must have a cestui que trust, a definite or ascertainable beneficiary. Also, in most jurisdictions, the rights of

## Exhibit 8—(Continued)

the cestui que trust are such that it has not only a personal right against the trustee to have the trust carried out, but also an equitable ownership of the trust res, or a "present equitable estate". Restatement of the Law of Trusts, secs. 112, 199; 17 Col. Law Rev. 269; Scott, *The Nature of the Rights of Cestui Que Trust*; *Title Insurance & Trust Co., v. Duffill*, 191 Cal. 629. Also, trustees are fiduciaries. In this case, Dr. Lombard conveyed the complete legal and equitable title to property to persons called "trustees" in exchange for all the issued fractional units in petitioner which were 600 in number. There was no conveyance to trustees in trust for named or personal beneficiaries as is typical of the traditional trust. The "beneficiaries" were only impersonal registrants holding units of interests in earnings and proceeds. The so-called trustees were to manage the property, and ultimately distribute the proceeds from liquidation, for such persons as might, from time to time, be the registered holders of fractional units, as shown on a register. The registrants could change from time to time through re-registration of units. And the register of such persons was to be only a "guide" to enable the petitioner to ratably apportion such distributions as it, in its discretion, decided to make (Article 14 of the "Hulbert Plan"). See *Solomon v. Commissioner*, 89 Fed. (2d) 569, where a business trust was held to be an association and where in the trust there were no named personal beneficiaries. Re-

## Exhibit 8—(Continued)

peatedly in the executed "Hulbert Plan" it is stated that petitioner was the sole owner of the "estate" with no [51] restraints on powers of alienation. Thus at the outset there is the very obvious lack of the elementary form of a trust in the agreements under which petitioner functioned.

An association implies associates. A trust implies present disposition of property to one for the benefit of another, not an undertaking to make a disposition in the future. Restatement of the Law of Trusts, pp. 62, 63. Notice to and acceptance by the trustee and the beneficiary is not essential. Evidence in this case which negatives the creation of a trust and which indicates an association is found in the fact that Dr. Lombard set about to obtain the consent of eight of the children to come into the plan. He did not obtain their consent at first and for that reason the entire 600 "issued" units of interests were registered in his name. The reregistrations of the 600 units to register interests in various children which were made on March 14, 1937, and February 26, 1938, were made pursuant to the consent of the eight children at or about such dates to come into the plan. Thus it appears that Dr. Lombard, his wife, and his eight children, became associates, Dr. Lombard contributing all of the property and the children sharing in the fruits of the enterprise, one of the children acting with Dr. Lombard in the management. See *Solomon v. Commissioner*, *supra*. There



## Exhibit 8—(Continued)

was no transfer of property by Dr. Lombard to a trustee in trust for named persons as a means of equitably distributing a legacy or donation to them. Of *Blair v. Wilson Syndicate Trust*, 39 Fed. (2d) 43, 46, where the court pointed out a distinction between an association and a trust as lying in a voluntary association of individuals for convenience and profit as opposed to a method of distributing a [52] donation. It is not material that the eight children did not contribute property. *Roberts-Solomon Trust Estate*, 34 B. T. A. 723, 725, *affd.* 89 Fed. (2d) 569.

Purpose is important, if not determinative. Part of petitioner's burden of proof goes to showing what was the purpose in executing the agreement under which petitioner functions. Petitioner asks us to go outside the terms of the agreement which was in effect in the taxable year for the purpose. This we cannot do. *Helvering v. Coleman-Gilbert Associates*, 296 U. S. 369; Sup. Ct. 285, 287. Dr. Lombard executed another agreement on September 30, 1938, entitled "Declaration of Trust" to take the place of the "Hulbert Plan" executed in 1935. That agreement follows more closely the form of a traditional trust, but it was not in effect in the taxable year. Nowhere in the agreement which was in effect in 1937 is there any statement of purpose to place property in trust for the benefit of named persons to provide them with a definite income, and with property, or proceeds from liquidation thereof, upon the death of Dr. Lombard



## Exhibit 8—(Continued)

or at any ascertainable time. Cf. *Living Funded Trust of Harry E. Lyman*, 36 B.T.A. 161. We must look to the terms of the "Hulbert Plan" which was executed rather than speculate as to what Dr. Lombard's state of mind may have been. The general purpose stated in the "Plan", the broad powers given to petitioner, the facts as to petitioner's activities all lead to the conclusion, in the absence of contradictory evidence, that the purpose was to provide a method of putting all of Dr. Lombard's business properties under centralized and continuous management for realizing profits and distributing them to all who came into the plan. Cf. *United States v. Davidson*, [53] 115 Fed. (2d) 799, 800, where, in the trust instrument in that case, it was stated that the purpose was not to form an association, but to convert trust property into money and distribute the proceeds to named beneficiaries.

From the limited facts on the point, it appears that petitioner is a business enterprise. It rents several properties and manages the buildings. The net annual rents, without considering depreciation, amount to \$15,751.10. The properties include four "mercantile buildings", a store, and a service station with equipment. Petitioner grows oranges, which is certainly an agricultural and business enterprise. In this activity petitioner expended for "farm expenses" over \$14,000. In 1937 the orange crop was sold for a gross amount of \$24,635. All of petitioner's business activities were to be carried

## Exhibit 8—(Continued)

on for a long period of time, not for the benefit of any named persons, in the 1935 agreement, but for the benefit of registrants, whoever they might be, from time to time. Thus it appears that petitioner, as a group of trustees, was not merely a "trustee" for collecting funds and paying them over, but rather petitioner was more like a board of directors of a corporation appointed to carry on business enterprises. *Hecht v. Malley*, *supra*. It is concluded that petitioner was a business trust in the taxable year. In form petitioner resembles a "Massachusetts trust", the only dissimilarity being that no paper certificates were issued, which is immaterial since a register was kept.<sup>1</sup> [54]

In other respects, petitioner resembles a corporation form of enterprise for the medium of conducting business and sharing in the gains. The "Articles of Administration" resemble both a charter and by-laws. The "trustees" resemble both the officers and directors of a corporation. The exclusive control over distributions reposed in the "trustees", both as to the amount and the time of distributions, is

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<sup>1</sup>In *Hecht v. Malley*, 44 Sup. Ct. 462,463, it was pointed out that a "Massachusetts trust" may be a trust of a partnership according to the way in which the trustees are to conduct affairs committed to them. If they are principals free from control by the holders of interests in the management of property, a trust is created. If the holders of interests are associated together in control of the property and the trustees are mere managing agents, a partnership relation between the holders of interests is created.

## Exhibit 8—(Continued)

like the power of the directors of a corporation to declare dividends. The “register” of “beneficiaries” resembles a record of stock ownership. The proviso that the register is a “guide” for making proportional distributions fixed distributions in accordance with the number of units allocated to each registrant, which is like distributing earnings in accordance with stock ownership.

It is held that petitioner is an association taxable as a corporation, and that such was its status throughout 1937. Upon this holding it is not necessary to consider any question relating to the inclusion in petitioner’s income of proceeds from the sale of the crop of oranges received at various dates in 1937.

Petitioner filed a late capital stock tax return for the period ending June 30, 1937, together with a check for the amount of tax, interest, and penalty due, on June 15, 1940. Respondent mailed the notice of deficiency on the same day. Petitioner is entitled to the credit claimed for the declared value of its capital stock in determining the excess profits tax. *Del Mar Addition v. Commissioner*, [55] 113 Fed. (2d) 410; *Jordon Creek Placers*, 43 B.T.A. 131; *Huron River Syndicate*, 44 B.T.A. 859. Respondent does not contend otherwise. Accordingly, the deficiency in the excess profits tax must be recomputed under Rule 50. Under the holding made, there is a deficiency in income tax in the amount of \$5,818.66.

Decision will be entered under Rule 50

Enter:

Entered May 6 1942 [56]

## EXHIBIT 9

United States Board of Tax Appeals  
Washington

Docket No. 104687

LOMBARD TRUSTEES, LTD., a Trust and  
CHARLES S. LOMBARD, BERTHA M.  
LOMBARD and NORMAN M. LOMBARD,  
Trustees thereof,

Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE,  
Respondent.

## DECISION

Pursuant to the Memorandum Findings of Fact and Opinion entered May 6, 1942, the respondent herein having on June 4, 1942, filed a recomputation of tax and the petitioner having on June 17, 1942, filed an acquiescence therein, now therefore, it is

Ordered and Decided: That there are deficiencies in income tax and excess profits tax for the calendar year 1937 in the respective amounts of \$5,-818.66 and \$258.14.

(Signed)

MARION J. HARRON

[Seal]

Member.

Enter:

Entered Jun 19 1942 [57]

EXHIBIT 10

United States Circuit Court of Appeals  
for the Ninth Circuit

B T A Docket No. 104687

LOMBARD TRUSTEES, LTD., a Trust, and  
CHARLES S. LOMBARD, BERTHA M.  
LOMBARD and NORMAN M. LOMBARD,  
Trustees thereof,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,  
Respondent.

PETITION FOR REVIEW OF DECISION  
OF BOARD OF TAX APPEALS

To the Honorable Judges of the United States Circuit Court of Appeals for the Ninth Circuit:

The petition of the above named petitioner respectfully shows:

1. This is a proceeding for review by the United States Circuit Court of Appeals for the Ninth Circuit of a decision of the United States Board of Tax Appeals, entered on June 19, 1942, redetermining deficiencies in income tax and excess profits tax for the calendar year of 1937 in the respective amounts of \$5,818.66 and \$258.14, all of which was in dispute.

2. Petitioner filed an income tax return for said year of 1937 with the Collector of Internal Revenue

at Los Angeles, California. The office of said Collector is within the Ninth Circuit.

3. The nature of the controversy before the Board of Tax Appeals was the determination of income and excess profits [58] taxes of petitioner for the year of 1937.

Petitioner claimed before said Board of Tax Appeals, and now claims:

(a) That at all times during 1937 petitioner was a trust and was taxable as a trust;

(b) That, assuming petitioner was an association taxable as a corporation, petitioner did not become such association until March 14, 1937, and was taxable as a corporation only on income for the period March 14, 1937 to December 31, 1937, which income amounted to and was the sum of \$6,613.43.

Respondent claimed before said Board of Tax Appeals that at all times during 1937 Petitioner was an association taxable as a corporation, and as such was taxable on income for the entire year, amounting to \$22,902.04.

The Board of Tax Appeals held petitioner was an association taxable as a corporation, and was such an association at all times during 1937.

Wherefore, petitioner prays this Honorable Court to review the action of the Board of Tax Appeals in this cause and reverse the decision of said Board and direct the entry of the decision of said Board in favor of petitioner, determining that petitioner was not an association taxable as a corporation during the year 1937, or in any event, was not such an asso-



ciation prior [59] to March 14, 1937, and determining petitioner's tax liability accordingly.

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Building

San Bernardino, California

[Endorsed]: Filed Sept. 8, 1942.

[Endorsed]: U.S.B.T.A. Filed Oct. 6, 1942. [60]

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[Endorsed]: No. 10289. United States Circuit Court of Appeals for the Ninth Circuit. Lombard Trustees, Ltd., a Trust, and Charles S. Lombard, Bertha M. Lombard and Norman M. Lombard Trustees thereof, Petitioner, vs. Commissioner of Internal Revenue, Respondent. Transcript of the Record. Upon Petition to Review a Decision of The Tax Court of the United States.

Filed October 19, 1942.

PAUL P. O'BRIEN,

Clerk of the United States Circuit Court of Appeals  
for the Ninth Circuit.

